Supreme Court, U.S.
FILED
AUG 5 - 2010
OFFICE OF THE CLERK

No. 08-1314

In The

SUPREME COURT OF THE UNITED STATES

Delbert WILLIAMSON, *et al.*,
Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., *et al.*
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

---

BRIEF OF THE ATTORNEYS INFORMATION EXCHANGE GROUP AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

Larry E. Coben
Coben & Associates
8710 E. Vista Bonita Drive
Scottsdale, Arizona 85255
(480) 515-4745
LCoben@cobenlaw.com
Counsel for Amicus Curiae
Attorneys Information Exchange Group

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

703 41

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 10
- A. Background 10
- B. Federal Statutory Framework. 10
- C. Review of The Evolving Application of Principles of Federal Preemption. . 12
- D. Lower Court's Have Misapplied The Supreme Court's Preemption Decisions 21
- E. The Court Should Reconsider Its Conclusion of The Savings Clause . 22
- F. What Did Congress Say in The Safety Act? 26
- G. NHTSA's Regulatory Approach To Rear Seat Belts and Executive Order 12612 29

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005) . . 12, 17

Freightliner Corp. v. Myrick, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) . . 11, 13, 34

Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) . . . . . *passim*

Haywood v. Drown, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009) 22

Larsen v. General Motors Corporation, 397 F.2d 495 (8th Cir. 1968) 4

Medtronic, Inc. v. Lohr, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) 13

Riegel v. Medtronic, 552 U.S. 312, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008) 12, 31

Sprietsma v. Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002) 12, 15, 24, 25

Wyeth v. Levine, --- U.S. ---, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) 12, 18, 20, 25

Statutes

15 U.S.C. § 1391 (2) (1966, 1988 & Supp. III 1991) ..... *passim*

15 U.S.C. § 1392(a) 10

15 U.S.C. § 1392(d) 5, 7, 11, 26

15 U.S.C. § 1392(d) (1988 ed.) 7

15 U.S.C. § 1397(c) 5, 6

15 U.S.C. § 1397(k) 11, 15

49 U.S.C. § 30103(b) 26

49 U.S.C. § 30103(d) 26

49 U.S.C. § 30117(b) 26

49 U.S.C. § 30117(e) 26-27

49 U.S.C. §§ 30118-30121 26

49 U.S.C. § 30167(a) and (b) 26

Federal Regulations

32 Fed. Reg. 2415 28

52 Fed. Reg. 22818 (June 16, 1987) 30

54 Fed. Reg. 25275 (June 14, 1989) 31

54 Fed. Reg. 46258 31

68 Fed. Reg. 46546 (August 6, 2003) 32

68 Fed. Reg. 46546 (December 4, 2002) 32

69 Fed. Reg. 70904 (December 8, 2004) 33

FMVSS 208 ..... *passim*

Other Authorities

DOT 808 945, "Effectiveness of Lap/Shoulder Belts in the Back Outboard Seating Positions" ... 32

Executive Order 12612 ..... 2, 28, 31

H.R. Rep. No. 1776, 89th Cong. 2d Sess. 24 (1966) 6

Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, ('Safety Act Hearing'), 89th Cong. 2d Sess. Part 2, 1249 (1966) 6, 28

Hoening, *Resolution of "Crashworthiness" Design Claims*, 55 St. John's L.Rev. 633 (1981) 4

Ralph Nader, *Unsafe at Any Speed* (1965) 10

S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966) 5, 10, 28

Safety Study–Performance of Lap/Shoulder Belts in 167 Motor Vehicle Crashes, NTSB/SS-88/02 . 29

Special Study, The Roles of General Services Administration and Department of Transportation in Motor Vehicle Safety Standards, Report No. NTSB HSS 70 1 (June 3, 1970) 4

STATEMENT OF INTEREST[1]

The Attorneys Information Exchange Group (AIEG) is an organization of over 600 attorneys who practice civil litigation throughout these United States. AIEG was founded in the mid-1970's by attorneys who were then representing burn victims who were motorists in cars and trucks that were burning up in collisions. Its founding members dedicated themselves, and this organization, to the creation of a private cooperative entity, which would serve to educate and coordinate the acquisition of technical information germane to the fair and honest representation of Americans who have suffered serious or catastrophic injury as a result of defective designs in motor vehicles. Over the years, AIEG members have represented the victims of such infamous products as the Ford Pinto, General Motors cars and pick-up trucks with poorly designed fuel systems (*e.g.*, side saddle fuel tanks), Audi and Toyota vehicles with sudden, uncontrollable acceleration, and thousands of Ford Explorers with Firestone tires that have left untold numbers of Americans maimed. Members of AIEG on a daily basis are involved in pursuing products liability claims typically stemming from the faulty design or manufacture of motor vehicles. Our clients are those Americans who have suffered

---

[1] This *Amicus Curiae* brief is filed pursuant to Rule 37 and consent to file it has been granted by written consent of the parties. Further, this Brief was not authored nor was any monetary contribution to the preparation or submission of this Brief provided by any party to this action.

catastrophic injury or the families of deceased loved ones. In the prosecution of these common law claims, we are called upon to study and address the relationship between vehicular design, injury causation and any relevancy of compliance with federal standards promulgated pursuant to the Safety Act. *Most often, it has been found that there is very little relationship between a vehicle's compliance with these standards and the safety performance of these products in real world accidents.* AIEG' s members have a vital interest in the effect of the decision of the California Court of Appeals (and other similarly decided cases) may have on its members and the clients they represent because motor vehicle manufacturers continue to produce vehicles which only meet the bare minimum federal safety standards, thereby resulting in the sale of vehicles which may not be reasonably safe. The decision reached by the Court of Appeals potentially allows product manufacturers to argue that compliance with any federal vehicle regulation that allows for alternative methods to satisfy these minimum regulations immunizes them from common law responsibility to build and sell non defective/safe vehicles. Likewise, the decision of the Court of Appeals is at odds with the balance intended by the United States Constitution, the United States Congress and the Executive Branch (in the issuance of Executive Order 12612) which has a continuing interest in limiting Federal Agencies from imposing their will upon States without a clear Congressional statement of the importance of taking such action and then only after careful study and consultation with

State representatives to minimize this excursion into the time-honored role of the Common Law.

SUMMARY OF THE ARGUMENT

In 1966, the United States Congress passed the National Traffic Safety Act (referenced as the Safety Act), in an effort to establish regulations for vehicle and vehicle equipment performance which would provide basic and minimum safety of vehicles sold in this country. Simultaneously, Congress authorized the establishment of a government agency to develop and promulgate these regulations, which became known as the National Highway Traffic Safety Administration (NHTSA). The legislators who passed the Safety Act in 1966 were quite aware of then existing regulations and standards which many of the states had promulgated, and which required automobile manufacturers to only sell cars in these respective states if these vehicles were equipped with certain devices, such as front seat seatbelts.

Congress was asked by some facets of the motor vehicle industry and the safety community to pass legislation which would have the effect of eliminating diverse state regulations, so that only one governmental agency would control the development and promulgation of standards which vehicle companies would be obliged to meet in order to market their products in this country. These standards were defined by Congress as "minimum standard[s] for

motor vehicle performance".[2] As the National Transportation Safety Board reported in 1970[3]:

> The imposition of Federal Motor Vehicle Safety Standards for certain characteristics of vehicle safety insures that a particular level of safety will be universally applied, *but* it does not insure that the highest level of safety will be the standard, nor does it insure that the highest practical level of safety will be available to purchasers in the market.

As a result of Congress' awareness of personal injury litigation and the application of the common law to question motor vehicle design safety [4], as well as the promulgation of some non-uniform state safety standards, the Safety Act addressed both issues. The Safety Act and its legislative history establish that Congress did *not* want conflicting safety regulations promulgated by state, local and federal regulators. This was made clear by the inclusion of the

---

[2] 15 U.S.C. § 1391 (2) (1966, 1988 & Supp. III 1991).

[3] Special Study, The Roles of General Services Administration and Department of Transportation in Motor Vehicle Safety Standards, Report No. NTSB HSS 70 1 (June 3, 1970), (see page 4).

[4] *Larsen v. General Motors Corporation*, 397 F.2d 495 (8th Cir. 1968). *See generally*, Hoening, *Resolution of "Crashworthiness" Design Claims*, 55 St. John's L. Rev. 633 (1981).

preemption clause in 15 U.S.C. § 1392(d). Likewise, the Congress did *not* want the federal agency interfering with the citizenries' right to fair compensation under the common law, which was made crystal clear by enacting the Savings Clause in 15 U.S.C. § 1397(c). The federal regulations do not exempt any person from any liability under the common law.

What is evident upon a review of the legislative history of the Safety Act is that the Savings Clause is much more than a mere expression of Congress' belief that "some" tort claims remain viable despite the promulgation of vehicle regulations. The legislative history of this provision establishes that compliance with a motor vehicle safety standard should not even be permitted as a defense in product liability suits against an automobile manufacturer. The Senate Report noted that:

> [t]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law. S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966).

The House of Representatives considered the Senate's draft legislation and insisted upon the language of the enacted "Savings Clause", providing Congress' express intent to preserve all common law

claims. The House Committee Report provided:

> Common law liability - §108(c) of the reported bill [15 U.S.C. §1397(c)] provides that compliance with any Federal motor vehicles safety standard does not exempt a person from any liability under common law. It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability. H.R. Rep. No. 1776, 89th Cong. 2d Sess. 24 (1966).

Congressional sentiment explaining why the House of Representatives inserted §1397(c) was explained by Congressman Tim Triplett, when he stated:

> We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product. Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, (Safety

> Act Hearing'), 89th Cong. 2d Sess. Part 2, 1249 (1966).

Unlike the language used by Congress in other legislation, here Congress expressed its intent (in section 1392(d)) to preempt *only* the conduct of states and political subdivisions:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment, any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. 15 U.S.C. § 1392(d) (1988 ed.).

In this instance, it is not just that Congress' statement of preemption does not mention common law, but rather that Congress specifically identified the state and political subdivision activity which it intended to preempt, *i.e.*, the establishment by a State or political subdivision of standards with respect to vehicles or equipment that are not identical to the federal standard. And, Congress also expressed its intent to preserve all aspects of the common law by stating that compliance with federal safety standards

does not exempt any person from any liability under common law.

It was, we respectfully submit, a mistake of honest but fallible proportions when this Court concluded in *Geier* that the Savings Clause was simply promulgated to allow for some common law claims shown not to be in conflict with regulations issued by the NHTSA. Congress intended by its language to establish minimum standards which all companies are required to meet before they can market their products in the United States. On the other hand, since Congress expected the federal agency to promulgate *only* minimum standards, it likewise preserved for all consumers the right to fair compensation vis-a-vis the jury system, and it expected that the "threat" of common law liability would spur manufacturers to do much more, or suffer liability for injury caused, then simply meeting these standards.

When Congress passed the Safety Act it did not establish any sort of administrative remedy for Americans injured by defectively designed and manufactured products, because it expected that common law remedies would address this harm. Over the past thirty years, the motor vehicle federal standards have, with few exceptions, not changed. A prime example of the stagnant nature of these standards is FMVSS 208 and what has been the course of that regulation regarding the type of seat belt equipment that may be installed in the second or third row of passenger vehicles. Suffice it to state, at the outset, that the NHTSA has never adopted a

regulation rejecting the safety efficacy of lap and shoulder belts in the rear seats of passenger vehicles. In fact, the opposite is the history of how NHTSA has viewed the safety value to be added by installing Type 2 (lap and shoulder belt) rather than Type 1 (lap belts) in the rear seats. It is, therefore, no wonder that the United States in its *Amicus* Brief has informed the Supreme Court that there is no grounds for finding implied preemption in the instant case.

We ask the Court to establish for all litigants the clear proposition that because Congress expressly preserved all common law remedies in promulgating the Safety Act, it must follow that there is no statutory authority to apply implied-conflict preemption here. And, therefore, courts should not be given license to impose their will upon injured consumers and preempt these claims, despite a manufacturer's satisfaction of the minimum safety regulations.

There is nothing unique about a federal minimum safety standard providing manufacturers with alternative means to meet a very basic level of crash safety, and allowing injured victims of non-crashworthy vehicles an opportunity to prove to juries that their injuries are attributable to a manufacturer's failure to go beyond the bear minimum in safety design. Certainly following this approach does not evidence nor facially establish a need for implied-conflict preemption. And, in fact, such lawsuits can only serve to promote improvements in design protection. In the event, however, that the Court should decide to analyze the issue here pursuant

to conflict-implied-preemption principles, we submit, as has the United States in its *Amicus* Brief, that there is no justification to find implied preemption.

ARGUMENT

A. Background

Over forty years ago, the publication of Ralph Nader's *Unsafe at Any Speed* (1965) helped spur two major developments in the law. First, it prompted attorneys and the courts to give increased attention and recognition to what was then a relatively recent engineering development--the design of vehicles to be crashworthy. Second, it prompted Congress to give increased attention to the need for federal motor vehicle safety legislation and, ultimately, the passage of the Safety Act of 1966. In the intervening years, the application of the common law to the field of automotive safety has allowed actions for the deaths and injuries that the motor vehicle industry knew would result from their longstanding refusal to install safety device.

B. Federal Statutory Framework.

Congress passed the National Traffic Safety Act in 1966 to reduce motor vehicle injuries and deaths. *See* S. Rep. No. 89-1301, 89th Cong., 2d Sess., 1-2 (1966). To this end, Congress empowered the NHTSA to prescribe "motor vehicle safety standards." 15 U.S.C. § 1392(a). The Act defined "safety standards" as

"*minimum* standard[s] for motor vehicle performance or motor vehicle equipment performance . . . " 15 U.S.C. § 1391(2) [Emphasis added]. The Safety Act contains a preemption section providing that once a standard is adopted, neither a State nor Political Subdivision may issue a standard that is not identical to a federal safety standard applicable to the same aspect of performance. 15 U.S. C. § 1392(d). Further, the Safety Act includes a Savings Clause which legislates that "[c]ompliance with any federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

More than 30 years after the passage of the Safety Act, this Honorable Court was called upon to decide, in relatively short succession, two cases that analyzed Congressional and Federal Agency preemptive intent in two common law claims, with very different regulatory history. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) and *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 870, 120 S.Ct. 1913, 1920, 146 L.Ed.2d 914 (2000). This precedent has spawned, in the past decade, literally hundreds of lower court decisions and several subsequent decisions of this Court as it has been called upon to decide the preemptive effect of other federal legislation and regulations applied to pleasure boat

propellers[5], medical devices,[6] over the counter medications[7], pesticides[8], etc.

C. Review of The Evolving Application of Principles of Federal Preemption.

This Honorable Court's construction of federal legislation, federal regulations and common law causes of action and the application of ordinary principles of federal preemption has, with all due respect, been somewhat less than precise. Perhaps the evolution of the Court's preemption methodology is the product of the variability of the statutes and regulations that it has been called upon to study. It is difficult not to notice the evolving sentiment of the Court's Majority in several pertinent decisions.

---

[5] *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002) (propeller guard issue).

[6] *Riegel v. Medtronic*, 552 U.S. 312, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008) (FDA regulations preempted tort claim for negligent marketing of medical device approved by the Agency.

[7] *Wyeth v. Levine*, --- U.S. ---, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (failure to warn claim was not preempted by the FDA regulations/standards). *Riegel, supra.*

[8] *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005).

Myrick,[9]

Absent an applicable standard, there is no occasion under the applicable statutory scheme to consider federal preemption of this common law claim.

> Because no federal standard exists, we need not reach respondents' argument that the term 'standard' . . . pre-empts only state statues and regulations, but not common law. We also need not address respondents' claim that the saving clause . . . does not permit a manufacturer to use a federalsafety standard to immunize itself from state common-law liability. 514 U.S. 280, 287, n 3.[10]

Because the States are independent sovereigns in our federal system, the Court noted that it has long presumed that Congress does not cavalierly preempt state-law causes of action. As a result, any understanding of the scope of a preemption statute must rest primarily on 'a fair understanding of congressional purpose.'

---

[9] The Judgment of the Court was unanimous in *Myrick*-decided in 1995.

[10] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed 2d 700 (1996).

Congress' intent, of course, primarily is discerned from the language of the preemption statute and the 'statutory framework' surrounding it. . . . Also relevant, however, is the 'structure and purpose of the statute as a whole,' . . . . as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." 518 U.S. at 485.

Geier,[11]

The saving clause assumes that there are some significant number of common-law liability cases to save. And a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate-for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. . . . The language of the pre-emption provision permits a narrow reading that excludes common-law actions. . . . [Emphasis added.]

---

[11] 529 U.S. at 868, 120 S. Ct. at 1918.

> . . . We now conclude that the saving clause (like the express pre-emption provision) does not bar the ordinary working of conflict pre-emption principles.
>
> Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations. The words '[c]ompliance' and 'does not exempt', 15 U.S.C. § 1397(k) (1988 ed.), *sound as if* they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one. . . It is difficult to understand why Congress would have insisted on a compliance with federal regulation precondition to the provision's applicability had it wished the Act to 'save' all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act. 529 U.S. at 869.

Sprietsma,[12]

---

[12] *Sprietsma, supra*, 537 U.S. at 63, 123 S.Ct. at 526 [citing *Geier*] (Unanimous decision).

. . . [T]he express pre-emption clause in § 10 applies to 'a [state or local] law or regulation.'. . . We think that this language is most naturally read as not encompassing common-law claims for two reasons. First, the article 'a' before 'law or regulation' implies a discreteness-which is embodied in statutes and regulations-that is not present in the common law. Second, because 'a word is known by the company it keeps',. . . the terms 'law' and 'regulation' used together in the pre-emption clause indicate that Congress pre-empted only positive enactments. If 'law' were read broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to 'regulation' in the pre-emption clause superfluous.

The Act's saving clause buttresses this conclusion. . . . It states that '[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.'

Bates,[13]

> . . . we consider whether petitioners' claims are pre-empted by § 136v(b) . . . 'Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.'
>
> The prohibitions in §136v(b) apply only to 'requirements'. An occurrence that merely motivates an optional decision does not qualify as a requirement. The Court of Appeals was therefore quite wrong when it assumed that any event, such as a jury verdict, that might 'induce' a pesticide manufacturer to change its label should be viewed as a requirement . . . .
>
> That §136v(b) may pre-empt judge-made rules, as well as statutes and regulations, says nothing about the scope of that pre-emption. . . . Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual

---

[13] *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443-44, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005).

> commitments plainly do not qualify as requirements for 'labeling or packaging'. None of these common-law rules requires that manufacturers label or package their products in any particular way. Thus, petitioners' claims for defective design, defective manufacture, negligent testing, and breach of express warranty are not pre-empted.
>
> *Wyeth*,[14]

Employing principles of implied preemption via the regulatory scheme of the FDA, the Court observed:

> *Wyeth* contends that the FDCA establishes both a floor and a ceiling for drug regulation: Once the FDA has approved a drug's label, a state-law verdict may not deem the label inadequate, regardless of whether there is any evidence that the FDA has considered the stronger warning at issue. The most glaring problem with this argument is that all evidence of Congress' purposes is to the contrary. . . . Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs in the 1938 statute or in any subsequent amendment. Evidently,

---

[14] *Wyeth*, *supra*, — U.S. —, 129 S.Ct. at 1205.

> it determined that widely available state rights of action provided appropriate relief for injured consumers. It may also have recognized that state-law remedies further consumer protection by motivating manufacturers to produce safe and effective drugs and to give adequate warnings. . . . 129 S.Ct. at 1199-1200.

In a Concurring Opinion, Mr. Justice Thomas stated:

> I have become 'increasing[ly] reluctan[t] to expand federal statutes beyond their terms through doctrines of implied pre-emption.' . . . 129 S. Ct. at 1207.
>
> The Court's decision in *Geier* to apply 'purposes and objectives' pre-emption based on agency comments, regulatory history, and agency litigating positions was especially flawed, given that it conflicted with the plain statutory text of the saving clause within the Safety Act, which explicitly preserved state common-law actions by providing that '[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law', . . . [citations omitted]. In addition, the Court's reliance on its divined purpose of the federal law - to gradually phase

> in a mix of passive restraint systems, in order to invalidate a State's imposition of a greater safety standard was contrary to the more general express statutory goal of the Safety Act 'to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents', . . . This Court has repeatedly stated that when statutory language is plain, it must be enforced according to its terms. . . . The text in *Geier* directly addressed the precise question at issue before the Court, so that should have been 'the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' [citation omitted]. With text that allowed state actions like the one at issue in *Geier*, the Court had no authority to comb through agency commentaries to find a basis for an alternative conclusion. 129 U. S. at 1214-1215.[15]

---

[15] The Dissenting Opinion in *Wyeth* observed that the federal agency's view of the scope of its statutory authority and regulatory application is a valuable indicator of the scope of implied preemption. Reflecting upon the decision in *Geier*, the *Wyeth* Dissent stated:

> Notwithstanding the statute's saving clause, and notwithstanding the fact that Congress gave the Secretary authority to set only "minimum" safety standards, we held Geier's state tort suit pre-empted. . . . [W]e relied heavily on the view of the Secretary of Transportation expressed in an *amicus* brief, that Standard 208 'embodies the Secretary's policy judgment that safety would best be promoted if

D. Lower Court's Have Misapplied The Supreme Court's Preemption Decisions

The Brief in support of the Petition for Certiorari filed by the United States aptly points out that many courts, like the one below, have misapplied the *Geier* rationale to a host of common law claims that do not warrant dismissal based on federal preemption.

> Manufacturers always have the 'option' of exceeding a minimum safety standard when NHTSA has decided not to mandate a more stringent alternative because of considerations of cost or feasibility, as NHTSA did in this case, and indeed, often does in considering regulatory alternatives. But if such an 'option' alone were enough to trigger federal preemption under *Geier*, the Safety Act's savings clause would be greatly undermined. *Geier* does not mandate that result, because it determined that under the Safety Act,

---

> manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car. (quoting Brief for United States as *Amicus Curiae*, O.T.1999, No. 98-1811, p. 25).

In the instant case, the Secretary of Transportation has written that the Williamson's lawsuit does not conflict with the relevant regulations.

> common law tort actions may proceed unless they conflict with a FMVSS, and here, there is no conflict. U.S. Government *Amicus* Brief, 2010 WL 1653014 *15.

E. The Court Should Reconsider Its Conclusion of The Savings Clause

Before we analyze the application of implied-conflict preemption, we ask that the Court reconsider the precise language Congress used when it included a state/political sub-division's standards "preemption clause" and a state common law "savings clause." It is, we respectfully submit, unfortunate that the sweeping approach to preemption based on perceived congressional purpose in *Geier* has led to an unconstitutional invalidation of state common laws. *Haywood v. Drown*, 129 S.Ct. 2108, 2133, 173 L.Ed.2d 920 (2009) (Dissent by Thomas, J. and joined by the Chief Justice and Justices Alito and Scalia).

In *Geier*, [529 U.S. at 871, 120 S. Ct. at 1920], the Majority explained why it studied implied preemption, stating:

> . . . the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims. That policy by itself disfavors

> pre-emption, at least some of the time. But we can find nothing in any natural reading of the two provisions that would favor one set of policies over the other where a jury-imposed safety standard actually conflicts with a federal safety standard.
>
> . . . *We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship.* Cf. post, at 1935, n. 16. *But there is no reason to believe Congress has done so here.* [Empahsis added]

The predicate employed by the *Geier* Court to reject the conclusion that Congress intended to preserve *all* common law actions, even if some might conflict with a NHTSA regulation, was capsalized by this query: "[w]hy, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake?" *Id.* But, with all due respect, that query should not have been raised given Congress' clear statements. And even more perplexing was the fact that after raising this inquiry, the Court did not read the Congressional Record for an answer, but instead it discerned the answer based upon general principles of federalism. Why make that inquiry when Congress made a clear distinction between state and political standards at one end of the spectrum and common law claims at the other? The language chosen by Congress

in the Safety Act was very similar to the statutory scheme studied in *Sprietsma*, *supra*, 537 U.S. at 62-64:

> The saving clause is also relevant for an independent reason. The contrast between its general reference to 'liability at common law' and the more specific and detailed description of what is pre-empted by § 10, including the exception for state regulations addressing 'uniquely hazardous conditions', indicates that § 10 was drafted to pre-empt performance standards and equipment requirements imposed by statute or regulation.
>
> Our interpretation of the statute's language does not produce anomalous results. It would have been perfectly rational for Congress not to pre-empt common-law claims, which-unlike most administrative and legislative regulations-necessarily perform an important remedial role in compensating accident victims. . . . Indeed, compensation is the manifest object of the saving clause, which focuses not on state authority to regulate, but on preserving 'liability at common law or under State law'. In context, this phrase surely refers to private damages remedies.

. These observations in *Sprietsma* harken back to the view expressed in the Dissenting Opinion in *Geier*:

> It is perfectly clear, however, that the term 'safety standard' as used in these two sections refers to an objective rule prescribed by a legislature or an administrative agency and does not encompass case-specific decisions by judges and juries that resolve common-law claims. When the pre-emption provision refers to a safety standard established by a 'State or political subdivision of a State', therefore, it is most naturally read to convey a similar meaning. In addition, when the two sections are read together, they provide compelling evidence of an intent to distinguish between legislative and administrative rulemaking, on the one hand, and common-law liability, on the other. This distinction was certainly a rational one for Congress to draw in the Safety Act given that common-law liability-unlike most legislative or administrative rulemaking-necessarily performs an important remedial role in compensating accident victims. *Cf. Silkwood v. Kerr-McGee Corp.* . . . 529 U.S. at 896.

See also Wyeth v. Levin, supra, 129 S.Ct. at 1214 (Concurring Opinion of Mr. Justice Thomas).

F. What Did Congress Say in The Safety Act?

The statutory provision labeled *"Preemption"* states: [49 U.S.C. § 30103(b)]:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, *no State or political subdivision* of a State shall have any authority either to establish, or to continue in effect, with respect to *any motor vehicle or item of motor vehicle equipment*[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. (Previously found at 15 U.S.C. § 1392(d)).

The statutory provision regarding "Warranty obligations and additional legal rights and remedies" states [49 U.S.C. § 30103(d)]:

> Sections 30117(b)[Preemption], 30118-30121, 30166(f) and 30167(a) and (b) of this title *do not* establish or *affect a warranty obligation* under a law of the United States *or a State*. A remedy under those sections . . . of this title is in addition to other rights and remedies under other laws of . . . *a State*. [Emphasis added.]

Finally, Congress provided in Section 30117(e) that:

> Common law liability.—Compliance with a motor vehicle *safety standard* prescribed under this chapter *does not exempt* a person from liability at common law. [Emphasis added.]

Read together, these statutes prove that the preemption section was *not* aimed at altering any aspect of the American consumers' states rights because (1) a manufacturer remains liable for breach of warranties and (2) compliance with theses standards, issued by NHTSA, does not exempt a manufacturer from liability at common law.

In *Geier*, the Court posited that while Congress can create a statutory scheme that eliminates the application of ordinary preemption principles, why would they do so? The answer is found here:

> We need a traffic safety agency and we need to research our problem from end to end, *but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.*
>
> You may think that the manufacturer is afraid of Government regulations but the cry you are hearing may be 'Briar Fox, please don't throw me in the briar patch'. If the government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze

> under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of 'Our product meets the Government standards', and an already compounded problem will be recompounded.[16]

The decision in *Geier* to not follow the literal words of the Safety Act has led hundreds of courts to simply ignore what Congress intended. We, therefore, respectfully submit, that it's time to address this issue and rule that Congress expressly saved all common law claims despite the promulgation and compliance with any federal motor vehicle safety standard.

G. NHTSA's Regulatory Approach To Rear Seat Belts and Executive Order 12612

The 1968 Rule FMVSS 208 first took effect in 1968. Then, and through 1992, this regulation provided for compliance by the installation of lap belts or lap/shoulder belts at designated seating position beyond the first row. 32 Fed. Reg. 2415. This regulation contained no explanation or statement of policy with respect to the decision to list lap and/or lap shoulder belts as the restraint systems of choice in rear seating positions. *Id.*

---

[16] Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, ("Safety Act Hearing"), 89th Cong. 2d Sess. Part 2, 1249 (1966).

1. The 1982 Petition

In 1982, NHTSA was petitioned to change FMVSS 208 to require only lap/shoulder belts in the rear seats of passenger cars. After the NHTSA studied this petition, it decided that because most Americans were not buckling up, there was no "cost-benefit" necessitating a change to FMVSS 208.[17]

2. 1984 Amendments to FMVSS 208

In 1984, NHTSA amended FMVSS 208 to require that manufacturers advise consumers in the Owner's Manual that rear seat lap/shoulder belts were available for retrofitting, and to specify how these additions could be made.[18]

3. 1986 NTSB Rear Seat Lap Belt Study

In 1986, the National Transportation Safety Board (the "NTSB") published a study describing the hazards associated with wearing a lap belt only in frontal collisions. [*Safety Study Performance of Lap/Shoulder Belts in 167 Motor Vehicle Crashes*, NTSB/SS-88/02]. Based upon this detailed investigation, the NTSB issued Safety Recommendations, which, stated that:

---

[17] By 1984, some European car manufacturers had already installed lap/shoulder belts in the rear seats of their passenger cars.

[18] Clearly indicating a regulatory preference for lap and shoulder belts in the back seats.

> [g]iven the known deficiencies of lap-only belt systems and the superior crash protection offered by belt systems that incorporate an upper torso restraint, the Safety Board believes that government and industry should take a number of steps to reduce reliance on lap belts and increase the availability of lap/shoulder belt systems.

With respect to new cars, the NTSB recommended that all designated positions in the rear seat should be equipped with lap/shoulder belts.

4. 1986 Petition To Amend FMVSS 208

In August 1986, NHTSA was again petitioned to require the installation of rear lap/shoulder belts in all new passenger cars. *See* 52 Fed. Reg. 22818-19 (June 16, 1987). The Agency granted the petition and began reexamining whether to change FMVSS 208 and require the installation of rear seat lap/shoulder belts. In 1987, NHTSA issued an Advance Notice of Proposed Rulemaking requesting comments on a proposal to amend FMVSS 208 to require lap/shoulder belts in rear seats of passenger cars. 52 Fed. Reg. 22818 (June 16, 1987). In this publication, the NHTSA estimated that replacing lap belts with lap/shoulder belts would raise effectiveness in reducing fatalities to 53 percent and reduce serious injuries to 50 percent. *Id.* at 22820. The NHTSA estimated that installing a lap/shoulder belt at the rear-center seat position would cost only

$20 per vehicle. *Id.* at 22819. In 1989, the Agency published its final rule requiring lap/shoulder belts in all rear outboard seating positions. 54 Fed. Reg. 25275 (June 14, 1989).

The NHTSA concluded that the greater effectiveness of rear seat lap/shoulder belts had become a significant factor because of the increased use of seat belts. *Id.* at 25276. This requirement was not extended to the center rear seat position nor to outboard seats in multipurpose passenger vehicles. *Id.* at 25278. See also, 54 Fed. Reg. at 46258. **NHTSA did, however, comment that if manufacturers were able to design and install lap/shoulder belts in these positions, it "is encouraged to do so".** Of course, NHTSA did not state any objection to installing a lap/shoulder belt instead of a lap belt in these other seat position.

Finally, in issuing this amended Rule, NHTSA stated that it had analyzed these amendments in accordance with Executive Order 12612 and determined that this Amendment did not warrant the preparation of a Federalism Assessment because it did not have any derisive affect on state law. *Id.*

5. The June 1999 Study[19]

---

[19] While the relevancy of the regulatory events transpiring after the sale of the vehicle in question are not controlling, they are accorded some deference when they have remained the same *Riegel, supra* 552 U.S. at 326

In June 1999, NHTSA published a study on the relative safety advantages of lap belts and lap/shoulder belts in the rear seats of cars (DOT 808 945, "Effectiveness of Lap/Shoulder Belts in the Back Outboard Seating Positions"). NHTSA's principal conclusion was that "[t]he change from lap to lap/shoulder belts has significantly enhanced occupant protection, especially in frontal crashes." *Id.*

> In frontal crashes, lap/shoulder belts are 25 percent more effective than lap belts alone. . . . Lap/shoulder belts reduce the risk of both head and abdominal injuries in potentially fatal front crashes relative to lap belts only: head injuries by 47 percent and abdominal injuries by 52 percent. *Id.*

6. The 2003 Proposed Amendment

In December 2002, President Bush signed "Anton's Law," which provided for improvements in child safety devices. *See* 68 Fed. Reg. 46546 (December 4, 2002). One provision of Anton's Law required that NHTSA amend FMVSS 208 to require the installation of lap/shoulder belts in rear-center seating positions by no later than December 2004. In August 2003, pursuant to this statutory directive, NHTSA published a proposal to require lap/shoulder belts in all rear-center seats. 68 Fed. Reg. 46546 (August 6, 2003). NHTSA stated that Anton's Law is ". . . fully consistent with the agency's preexisting plan to initiate rulemaking" to require lap/shoulder belts in rear-center seats. *Id.* at 46547. In its Notice of

proposed rulemaking, the Agency emphasized that requiring lap/shoulder belts in rear-center seats would not just benefit children, [but] "[i]t would also benefit older occupants." *Id.* On this point, the Agency cited the conclusions of its 1999 study, which found that requiring lap/shoulder belts in all rear seats would provide significant safety benefits for both adults and children. *Id.*

7. The 2004 Final Rule Requiring Lap/Shoulder Belts In Rear Center Seats

In 2004, NHTSA published a final rule requiring the installation of lap/shoulder belts in all rear seats. In this announcement, NHTSA specifically stated that *"[t]he final rule is not intended to preempt state tort civil actions."* 69 Fed. Reg. 70904, 70912 (December 8, 2004).

CONCLUSION

The core teaching of *Geier* is that regulatory options, standing alone, do not possess any preemptive force. If the mere existence of regulatory options were sufficient to preempt tort claims, then the Majority in *Geier* would not have needed to address the complex policy reasons underlying the air bag phase-in of FMVSS 208; it would have been sufficient to point out that the car maker had chosen to install one of several permitted regulatory options. *Geier*, however, never purported to rely on such an observation. To the contrary, the Court's decision included and is based on a detailed and exhaustive examination of the highly unusual history and framework of the air bag standard

of FMVSS 208. *Geier* thus makes clear that regulatory options do not exert any preemption force under the Safety Act *unless* they are based on special safety concerns that would be directly undermined by a common-law claim. As we now explain, no such concerns exist in this case.

For over thirty years, NHTSA has remained a major proponent of lap and shoulder belts. The regulatory history of FMVSS 208 shows at least two things: (1) a lap and shoulder belt system is significantly superior to a lap belt only, and (2) the government continuously expressed its hopes and goals to have lap and shoulder belts in every seated position in every motor vehicle as early as possible. And, conversely, NHTSA has never rejected as a safety imperative the inclusion of lap and shoulder belts at each seating designation.

The government's decision to defer making lap and shoulder belts a requirement was certainly not the same as, or tantamount to, a policy statement encouraging the continuing installation of lap belts only. The regulatory history in this instance is very much the same as what the Court considered in both *Myrick* and *Spriestma*. And, therefore, at the very least the same decision rejecting implied preemption should be found.

Respectfully submitted, this 29th day of July, 2010.

Larry E. Coben
COBEN & ASSOCIATES
8710 E. Vista Bonita Drive
Scottsdale, AZ 85255
(480) 515-4745
LCoben@cobenlaw.com
Counsel for Amicus Curiae
The Attorneys Information
Exchange Group